cile. While admitting that the English have been correct in refusing to recognize the anomalous Anglo-Chinese domicile, yet he points out that the objection is in reality to the name only, and that there is no objection to the recognition of a Chinese domicile, which by force of a treaty makes a decedent's estate subject to English law. This, he suggests, is the true basis on which the Anglo-Indian cases can be sustained.

The reasoning in the last-cited case appears thoroughly sound, and the earlier perplexities of the problem become wholly simplified, if worked out along this line of thought.

It is submitted, therefore, that a brief summary of the correct solution of the problem would be as follows:

1. *As a matter of law,* one test of domicile should be applied to all countries alike, and this test is the *animus et factum,* both of which must concur with respect to a given sovereign locality.

2. *As a matter of fact,* whether or not the *animus et factum,* have occurred must be determined from the particular circumstances, just as any other question of fact, but in determining this question of fact the locality should be considered, and may, from its political condition, raise a presumption of fact against the required animus, but this presumption should always be rebuttable.

Thus in the case of a testator who died while residing in the midst of a savage African tribe, the presumption of fact would be very strong against the necessary animus to establish a domicile, but the rule of law would apply as definitely and as clearly as if the testator had died in France, or in any other enlightened country, and the confusion and conflict incident to the English doctrine would be wholly avoided. As for the influence of treaties of exterritoriality, it is submitted that their only effect would be to raise a slight presumption in favor of the necessary animus; for in selecting a new domicile of choice, the fact that his affairs would be regulated by the common law of his own country would tend to influence a man in favor of the new domicile. *W. L. M.*

THE POWER OF THE STATE TO REGULATE FOREIGN CORPORATIONS ENGAGED IN INTERSTATE BUSINESS THEREIN IS SUBORDINATE TO THE FEDERAL CONSTITUTION.

The United States Supreme Court held in the recent case of *Western Union Telegraph Company* v. *Kansas, ex rel. Coleman,*[1] that the exaction from the defendant company for the

[1] U. S. Sup. Ct. Adv. Sheets, Feb. 20, 1910 (216 U. S.), p. 1.

benefit of the permanent school fund (under the authority of Kansas Gen. Stat. 1901, p. 285, § 1264; Gen. Stat. 1905, p. 290, § 1336) of a charter fee of a given per cent. of its entire authorized capital stock as a condition of its continuing to do local business in the State, is invalid under the commerce and due process of law clauses of the Federal Constitution as necessarily amounting to a burden and tax on the company's interstate business and on its property located or used outside the State.[2]

Under this statute the Western Union Telegraph Company made application to the charter board [3] for permission to engage in business in Kansas as a foreign corporation, stating that the amount of its capital stock, fully paid up in cash, was $100,000,000.

The charter board granted the application of the telegraph company, subject to the proviso, "that the order should not take effect and no certificate of authority should issue or be delivered to the company 'until such applicant shall have paid to the State Treasurer of Kansas, for the benefit of the permanent school fund, the sum of twenty thousand, one hundred dollars ($20,100), being the charter fee provided by law necessary to be paid by a foreign corporation having a capital of $100,000,000.'" The interstate and federal government business was expressly excluded from the operation of the proviso and it was therein expressly stated "that this grant of authority and requirement as to payment relate only to the business transacted wholly within the State of Kansas."

The telegraph company refused to pay the charter fee and continued, as before, to do telegraph business of all kinds in Kansas. Thereupon, the Attorney General of Kansas brought this action of *quo warranto* in the State Courts, the sole ground of complaint being that, in consequence of the failure of the telegraph company to pay the charter fee of $20,100, it was without authority to continue doing any intrastate or local business in the State. The Supreme Court of Kansas issued a decree restraining the company from transacting local business in the State, except so far as the company's duties to, or contracts with, the United States should be affected.[4]

The United States Supreme Court reversed the decree of the

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[2] U. S. Sup. Ct. Adv. Sheets, Feb. 15, 1910, p. 190 (Lawyer's Co-operative Pub. Co.). (Opinion by Mr. Justice Harlan.)

[3] For Act creating charter's board, see Kan. Gen. Stat., 1901, § 1260. Gen. Stat. 1905, § 1332.

[4] *State ex rel. Coleman as Attorney General* v. *Western Union Tel. Co.*, 75 Kan. 609 (1907).

Kansas Supreme Court substantially for the reasons given in the opening paragraph of this note. The concurring opinion of Mr. Justice White, while not dissenting from the fundamental principles advanced by the majority, was based primarily upon the reasoning that the defendant company was already in the State, by the State's acquiescence or implied invitation, and the aforesaid conditions could only be imposed, if at all, as the price of allowing it to come in.

Mr. Justice Holmes rendered a dissenting opinion, in which Chief Justice Fuller and Mr. Justice McKenna concurred. The dissenting opinion took the position (*a*) that the State of Kansas, having the absolute power of excluding the foreign corporation, the defendant, it could impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient, and that it may make the grant or privilege dependent upon the payment of a sum proportioned to the amount of its capital; (*b*) that the consequence is the measure of the condition and when the only consequence of a breach is a result which the State may bring about in the first place, the condition cannot be unconstitutional; (*c*) that by the decision in this case the Supreme Court abandons its latest decision, viz., *Security Mut. Life Ins. Co.* v. *Prewitt;*[5] (*d*) that in the absence of contract, the power of the State is not affected by the fact that the corporation concerned is already in the State, or even has been there for some time.

The principal case was followed in *Pullman Company* v. *Kansas,*[6] where the same general question arose under the same statute.

If State legislation, in fact, violates the Federal Constitution it is void, notwithstanding the fact that the legislature may not have intended to transgress that instrument. In determining whether the legislature has exceeded the limits of its authority the courts must look at the substance of the legislation. For instance, a State may not in the exercise of one of the powers given or reserved to it by the Constitution violate any of the provisions of that instrument. Therefore, a State may not in the exercise of its taxing power, or of its police power, lay a burden on interstate commerce.[7]

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[5] 202 U. S. 246, 50 L. Ed. 1013, 26 Sup. Ct. Rep. 619, 6 A. & E. Am. Cas. 317.

[6] 216 U. S. 56 (1909).

[7] *Gloucester Ferry Co.* v. *Pa.,* 114 U. S. 196 (license for carrying on interstate commerce; *Phila. & So. S. S. Co.* v. *Pa.,* 122 U. S. 326 (1886), tax on gross receipts, derived from interstate and foreign commerce; *Patterman* v. *Western Union Tel. Co.,* 127 U. S. 411 (1888),

The reported decisions show a pronounced difference of opinion among the judiciary in regard to the powers of a State over a foreign corporation, desiring to enter it, or to remain in it, if it is already in the State, to carry on therein an intrastate business. Omitting, however, all expressions of opinion in the cases which are not necessary to the decision of the court, it would seem from them that the following principles of law have been laid down by the United States Supreme Court:

1. Full power and control over its territories, its citizens, and its business belong to the State. In this way it derives its power to control and regulate foreign corporations in it and to prescribe the conditions upon which they may carry on intrastate business. This principle is subject to two exceptions: A State cannot exclude from its limits, (*a*) a corporation engaged in interstate or foreign commerce; nor can it exclude (*b*) a corporation employed by the Federal Government as its agent in carrying out one or more of the powers given to the Federal Government by the Federal Constitution.[8]

2. The power of the State in this respect is the same whether the foreign corporation is without the State desiring to enter the State to carry on therein intrastate business or whether the corporation is in the State and merely desires the right to continue to do an intrastate business; provided, that the State has not contracted away its power to regulate it in this regard.

3. It is unconstitutional for a State to impose as a prerequisite condition to the enjoyment of the right to do intrastate business, that the foreign corporation shall surrender any of its rights under the Federal Constitution or that it shall

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tax on gross receipts of telegraph company, engaged in interstate commerce; *G. H. & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217 (1908), tax on gross receipts of railway engaged in interstate commerce. *Western Union Tel. Co.* v. *Texas,* 105 U. S. 460 (1881), tax on interstate telegraph messages; *Robbins* v. *Shelby Cy. Taxing Dist.,* 120 U. S. 489 (1886); *Brennan* v. *Titusville,* 153 U. S. 289 (1894); *Asher* v. *Texas,* 128 U. S. 129 (1888); *Stoutenberg* v. *Hennick,* 129 U. S. 141 (1889); *Stockard* v. *Morgan,* 185 U. S. 27 (1901); *Caldwell* v. *N. Car.,* 187 U. S. 622 (1902). The above cases refer to license taxes on commercial "drummers" engaged in interstate commerce. *Crutcher* v. *Ky.,* 141 U. S. 47 (1890), license tax on agent of express company carrying on interstate business in the State; *Ling* v. *Mich.,* 135 U. S. 161 (1890), burden on interstate commerce; *Ling* v. *Harden,* 135 U. S. 100 (1889); *Brenner* v. *Rebman,* 138 U. S. 78 (1890), meat inspection, burdening interstate commerce.

[8] *Doyle* v. *The Continental Ins. Co.,* 94 U. S. 535 (1876), at page 536. Exceptions: (*a*) *Pensacola Telegraph Co.* v. *Western Union Tel. Co.,* 96 U. S. 1; (*b*) *Pembima, etc., Co.* v. *Pa.,* 125 U. S. 181; see also concurring opinion of Mr. Justice White in *Pullman* v. *Kansas,* 216 U. S. 56 (1910).

do that which is equivalent thereto; *i.e.*, enter into a binding agreement, specifically enforceable, not to exercise certain of its rights thereunder.[9]

4. Since a State has the right and power to withhold or grant the privilege to a foreign corporation, regardless of its reasons for so doing, it follows that it may withdraw the grant of the privilege for any reason whatever and may even provide that an exercise by the grantee foreign corporation of a right possessed by it under the Federal Constitution, as, for instance, its right in the proper cases to remove litigation to which it is a party from the State to the Federal courts, shall be cause for the withdrawal by the State of said privilege. Moreover, this provision for its withdrawal may be made in the same State statute which provides for the granting by the State to the foreign corporation of this privilege.[10]

The distinguishing factor between the class of cases represented by paragraph three and that represented by paragraph four is that in the former the corporation surrenders one or more of its constitutional rights, while in the latter it does not.

The majority opinion [11] distinguished *Insurance Company* v. *Prewitt* from the principal case, on the ground that "the business of the insurance company involved in the former case was not, as this Court has often adjudged, interstate commerce, while the business of the telegraph company was primarily and mainly that of interstate commerce." While it is true that the issuing of a policy of insurance is not a transaction of commerce, but a simple contract of indemnity against loss,[12] it is, nevertheless, true that in both cases the privilege which lay in the grant of the State was that of carrying on intrastate business. That in the present case the intrastate business happened to be intrastate commerce, cannot have the effect of making it any the less intrastate business, and, as such, subject to State regulation, as hereinbefore set forth. It is respectfully submitted that the former case should preferably be distinguished from the present case on the ground that in the former case the surrender of the right of removal of litigation from the State courts to the Federal courts in the proper cases

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[9] *Home Insurance Co.* v. *Morse*, 20 Wall. 445 (1874); *Barron* v. *Burnside*, 121 U. S. 186 (1887); *Western Union Tel. Co.* v. *Kansas*, *ante*.

[10] *Doyle* v. *Insurance Co.*, 94 U. S. 535 (1876), at p. 536; *Ins. Co.* v. *Prewitt*, 202 U. S. 246 (1906).

[11] At p. 45.

[12] *Paul* v. *Va.*, 8 Wall. 168 (1868), at p. 183.

was not a condition prerequisite to the granting of the privilege, but rather that the exercise of that right was designated by the statute as a sufficient cause for the withdrawal of the privilege,[13] while in the present case the defendant corporation is required as a prerequisite condition of the granting of the privilege to surrender two of its rights under the Federal Constitution.

To justify the placing of the present case under the principle of paragraph three instead of that of paragraph four, two propositions must appear: (*a*) that the condition was a prerequisite to the granting and enjoyment of the privilege by the defendant corporation; (*b*) that the condition required a surrender of one or more of defendant's rights under the Federal Constitution.

That the payment of the charter fee was a condition prerequisite to the right of the defendant to engage in intrastate business in Kansas is apparent (*a*) from the statute providing for the charter fee; (*b*) from the wording of the grant by the charter board of the defendant's application to do such a business, and (*c*) from the fact that the Attorney General of Kansas, on behalf of the State, brought this action of *quo warranto,* thereby contending that the defendant corporation had no authority to do such intrastate business, by reason of the non-payment of the charter fee prescribed by the statute.

This condition precedent to the granting of said privilege to defendant deprives defendant of its constitutional rights (1) by depriving it of its property without due process of law; (2) by imposing a burden on its interstate commerce, in violation of the commerce clause of the Federal Constitution.

The tax imposed on defendant as a charter fee is a specified percentage of the total capitalization of the defendant. This capitalization represents property of the defendant, situated throughout the entire Union, and engaged in both interstate and intrastate commerce in each of the several States. The tax is, therefore, in effect one in part upon property situated without the State of Kansas and, therefore, a taking of defendant's property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.[14]

It is also a burden upon the interstate commerce transacted by the company. Telegraphic communications are commerce.[15] The defendant is engaged in transmitting, for a

[13] This distinction seems to be justified by the majority opinion. *Ins. Co.* v. *Prewitt,* 94 U. S. 535, at p. 538.

[14] *Union Refrigerating Transit Co.* v. *Ky.,* 199 U. S. 194 (1905).

[15] *Leloup* v. *Port of Mobile,* 127 U. S. 640 (1888).

pecuniary remuneration, telegraph communications from one State to another. Subject to some individual exceptions, the rule is, that in classifying property for taxation some benefit to the property taxed is a controlling consideration.[16] It is often said protection and payment of taxes are correlative obligations.[17]

Tested by any of these tests, it is at once seen that this is not a *bona fide* tax on the property of the company used or operated by it within the State, or upon its intrastate business. A company with less of such property within the State of Kansas, but with a higher total capitalization, would pay a greater tax than a company with more of such property within the State of Kansas, but with a lower total capitalization. The same reasoning applies with equal force if we view the tax as a license tax for the privilege of doing an intrastate business. The amount of the tax is independent of the amount of such business and depends upon one factor only and that is the total capitalization. The total capitalization has no necessary or fixed relation to the intrastate business of the defendant company in Kansas. Therefore, if the tax is a license tax, it is one not for the privilege of carrying on intrastate commerce, but interstate commerce, and, therefore, unconstitutional.[18]

At this point attention should be called to the concurring opinion of Mr. Justice White in *Pullman Co.* v. *Kansas*,[19] in which he intimates strongly, "that where the right to do an interstate commerce business exists without regard to the assent of the State, a State law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business would be a direct burden upon interstate commerce, . . .", and that it imposed a direct burden on interstate commerce because the imposition on a corporation, which has the right to do interstate commerce business within the State, of an unconstitutional burden for the privilege of doing a local business is the exact equivalent of placing a direct burden on its interstate commerce business.

This view raises squarely the question whether or not the withholding of the right to transmit local messages over its wires, does, in fact, increase the cost of transmitting interstate messages. While this question is a technical one and cannot

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[16] *Norwood* v. *Baker*, 172 U. S. 269.

[17] *Union Refrigerating Transit Co.* v. *Ky.*, *ante*.

[18] *Phila. & Southern S. S. Co.* v. *Pa.*, 122 U. S. 326 (1886), see *ante*, foot-note (7).

be adequately treated in this note, it is suggested that the telegraph business, like the railroad business, is one of increasing returns; that this is true until the maximum economic capacity of the wires is obtained; and that an arbitrary decrease, by reason of the inability of the corporation to carry on local business, of the total amount of business carried over each wire would seem inevitably to require a larger percentage of the fixed and operating expenses to each interstate message and therefore to an increased cost per message. This additional cost would roughly represent the burden imposed if the defendant corporation is deprived, by reason of the non-payment of the charter fee, of the right to carry on intrastate business.[19]

In view of the fact that the Supreme Court (the majority opinion) distinguished the present case from that of *Prewitt* v. *Ins. Co.*[20] on the ground that the defendant in the present case was engaged in interstate commerce, *quare,* does the intimation in the concurring opinion of Mr. Justice White indicate that in the case of a corporation engaged in interstate commerce a State cannot make the grant of the right to carry on intrastate business in connection therewith, defeasible upon the exercise by it of a right under the Federal Constitution. (Compare paragraph 4, *ante.*)

For the foregoing reasons, and without adopting the view of the dissenting judges that the present case marks a departure by the Court from its decision in *Insurance Company* v. *Prewitt,* but, rather, that that case is distinguishable from the present case, we must agree with the decision of the majority of the Court in the case now under discussion.

LIABILITY OF WATER COMPANY TO PROPERTY OWNER.

Is a water company, which has contracted with a municipality to supply water, liable to an individual property owner whose property is destroyed by fire as a result of the negligence of the company in supplying the water? The well-considered case of *German Alliance Insurance Company* v. *Home*

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[19] *Compare: Darnell & Son Co.* v. *Memphis,* 208 U. S. 113; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500. (A State may not in the exercise of is taxing power discriminate against interstate commerce.)

[20] 202 U. S. 246 (1906).